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R. *v.* Knight; R. *v.* Hay, [2003] 1 S.C.R. 156, 2003 SCC 15

Her Majesty The Queen *Appellant*

v.

James David Knight *Respondent*

and between

Her Majesty The Queen *Appellant*

v.

Robert Merlin Hay *Respondent*

Indexed as: R. *v.* Knight; R. *v.* Hay

Neutral citation: 2003 SCC 15.

File No.: 29331, 29332.

2003: March 20.

Present: McLachlin C.J. and Gonthier, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for alberta

Criminal law — Manslaughter — Causation — Victim assaulted twice in a 24-hour period — Accused not involved in first assault — Trial judge concluding that severe assault by accused caused victim's death — Verdict of manslaughter reasonable.

APPEALS from a judgment of the Alberta Court of Appeal (2002), 312 A.R. 106, 281 W.A.C. 106, 6 C.R. (6th) 394, [2002] A.J. No. 1022 (QL), 2002 ABCA 191, allowing the accused's appeal from a judgment of Foster J. (2001), 288 A.R. 128, [2001] A.J. No. 392 (QL), 2001 ABQB 247, convicting the accused of manslaughter. Appeals allowed.

James A. Bowron, for the appellant.

F. Kirk MacDonald, for the respondent Knight.

Laura K. Stevens, for the respondent Hay.

The judgment of the Court was delivered orally by

1 ARBOUR J. — These are appeals as of right, involving the issue of whether a verdict for manslaughter was unreasonable.

2 We agree with Paperny J.A. that it was open to the trial judge to conclude as he did that the severe assaults by the respondents caused the death of the victim. It is therefore not necessary in our view to reach any conclusion as to whether leaving the victim unconscious and unclothed by the railway tracks was a contributing cause of death.

3 The appeals are allowed. The judgment of the Alberta Court of Appeal is set aside and the convictions and sentences entered by Foster J. of the Alberta Court of Queen's Bench are restored.

Judgment accordingly.

Solicitor for the appellant: Alberta Justice, Edmonton.

Solicitors for the respondent Knight: Pringle & Associates, Edmonton.

Solicitors for the respondent Hay: Anderson, Dawson, Knisely, Stevens & Shaigec, Edmonton.

Source: http://scc.lexum.umontreal.ca/en/2003/2003scc14/2003scc14.html

Goudie *v.* Ottawa (City), [2003] 1 S.C.R. 141, 2003 SCC 14

Corporation of the City of Ottawa *Appellant*

v.

Ken Goudie, Ron Labonté, Lloyd Laframboise,

Conrad Lirette and Rémi Séguin *Respondents*

Indexed as: Goudie *v.* Ottawa (City)

Neutral citation: 2003 SCC 14.

File No.: 28469.

2002: December 10; 2003: March 20.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for ontario

Labour relations — Jurisdiction of labour arbitrators and courts — Employees' action arising out of alleged pre-employment agreement with municipality — Whether cause of action asserted by employees within jurisdiction of courts or labour arbitrator under collective agreement.

Civil procedure — Determination of an issue before trial — Jurisdiction — Employees' action arising out of alleged pre-employment agreement with municipality — Jurisdictional issue as to whether courts or labour arbitrator had jurisdiction — Disagreement between parties essentially factual, not legal — Whether jurisdictional issue could be determined on preliminary motion — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 20, 21.01(3)(a).

The respondents, who had been civilian members of the Ottawa Police Force and covered by its collective agreement with the Ottawa Police Association (an employees' union), were transferred to the City of Ottawa's Physical Environment Department, whose employees were represented by the Canadian Union of Public Employees (CUPE). The respondents claimed that in 1983 the City had agreed, while they were still members of the Police Force represented by the police union, that they would continue to enjoy the same terms and conditions when they eventually joined the City as they had enjoyed with the Police Force. The City denied that any such agreement had been made. The respondents were not transferred to the City until 1985. Thereafter they asserted a complaint about reduced wages and benefits and brought this action against the City for damages. The City counterclaimed for an over-payment of wages to some of the respondents. Given that the respondents were now covered by the CUPE collective agreement, the City moved, under clause 21.01(3)(a) of the Ontario *Rules of Civil Procedure* to have the respondents' claim struck out for want of jurisdiction on the basis that the court had no jurisdiction over a "labour relations" subject matter. The motions judge gave effect to this objection and dismissed the action. The Court of Appeal reversed that decision on the basis that it would be open to a trial judge to find a pre-employment agreement altogether outside the City's collective agreement with CUPE.

Held: The appeal should be dismissed.

While a dispute which "in its essential character" arises from a collective agreement is to be determined by an arbitrator appointed in accordance with the collective agreement, access to the courts is not denied to a plaintiff who alleges a cause of action outside the collective agreement. If, as alleged in this case, the City's officials entered into a pre-employment agreement with the respondents, a dispute over such an agreement, in its essential character, could not have arisen out of the interpretation, application or administration of the collective agreement between CUPE and the City. A court therefore had jurisdiction to deal with the cause of action asserted by the respondents.

As to the procedure adopted in this case, the Court of Appeal properly held that the jurisdictional issue could not be dealt with by way of a preliminary motion. The disagreement between the parties was essentially factual, not legal. To meet the allegation of a pre-employment contract, the City filed an affidavit to show that there was no such contract. Yet it confirmed, by doing so, the existence of a serious factual dispute. While it is the practice in Ontario for the motions court to receive limited evidence pertinent to the jurisdictional issue, it was not appropriate for the City to attempt to turn a jurisdictional challenge under clause 21.01(3)(a) into a mini-trial on a disputed, central question of fact. The City could not avoid the exigencies of a summary judgment motion (rule 20) by framing its

attack as a jurisdictional challenge under clause 21.01(3)(a). If the City was of the view that the pleading of a pre-employment contract was a sham and raised no genuine issue for trial, it ought to have moved for summary judgment pursuant to rule 20.01. However, this was not a jurisdictional issue that turned on uncontroverted or easily ascertainable facts. Credibility is very much an issue. The decision of the Court of Appeal was therefore correct.

Cases Cited

Distinguished: *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14; **referred to:** *Wainwright v. Vancouver Shipyards Co.* (1987), 38 D.L.R. (4th) 760; *Johnston v. Dresser Industries Canada Ltd.* (1990), 75 O.R. (2d) 609; *Jadwani v. Canada (Attorney General)* (2001), 52 O.R. (3d) 660; *Giorno v. Pappas* (1999), 170 D.L.R. (4th) 160; *Bhaduria v. Toronto Board of Education* (1999), 173 D.L.R. (4th) 382; *Bhairo v. Westfair Foods Ltd.*, [1997] M.J. No. 219 (QL); *Allen v. Alberta* (2001), 286 A.R. 132; *Young Estate v. TransAlta Utilities Corp.* (1997), 209 A.R. 89; *Roberts v. Browning Ferris Industries Ltd.* (1998), 170 Nfld. & P.E.I.R. 228; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257; *Donoghue v. Stevenson*, [1932] A.C. 562; *Adler v. Dickson*, [1954] 1 W.L.R. 1482; *Leufkens v. Alba Tours International Inc.* (2001), 53 O.R. (3d) 112; *S. (J.R.) v. Glendinning* (2000), 191 D.L.R. (4th) 750; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423; *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 156 D.L.R. (4th) 222; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

Statutes and Regulations Cited

Labour Relations Act, R.S.O. 1990, c. L.2, s. 45(1) [now 1995, c. 1, Sched. A, s. 48(1)].

Police Act, R.S.O. 1980, c. 381, s. 8(5).

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 20.01, 21.01, 21.02.

APPEAL from a judgment of the Ontario Court of Appeal (2001), 197 D.L.R. (4th) 543, 139 O.A.C. 372, [2001] O.J. No. 101 (QL), setting aside a decision of the Superior Court of Justice. Appeal dismissed.

Eugene Meehan, Q.C., and *Stuart Huxley*, for the appellant.

Emilio S. Binavince and *Helen Lanctôt*, for the respondents.

The judgment of the Court was delivered by

1 BINNIE J. — It is well established that a dispute between an employer and an employee that arises in its essential character from the interpretation, application, administration or violation of a collective agreement is to be determined not in the courts but according to the arbitration provisions of the collective agreement.

2 The problem in this case is that the motions judge, summarily dismissing the respondent employees' action on a preliminary motion, placed too much emphasis on the collective bargaining environment and insufficient weight on the essential character of the dispute.

3 It is true that the respondents' complaint about reduced wages and benefits was asserted against their employer, the City of Ottawa, at a time when the respondents were covered by a collective agreement between the appellant and the Canadian Union of Public Employees, Local 503 ("CUPE").

4 The essential character of the dispute, however, is a claim under an alleged pre-employment contract. The respondents' entitlement, if any, did not arise out of the interpretation, application, administration or violation of the CUPE agreement. On the contrary, the respondents' complaint is precisely that they were paid according to the CUPE contract rather than under the more advantageous terms of the alleged pre-employment contract.

5 Whether or not there actually was a pre-employment contract is a hotly disputed fact that is not amenable to resolution on a preliminary motion. I think the Court of Appeal was correct to set aside the judgment of the motions court and to allow the action to proceed. The appeal from that court should be dismissed.

Facts

6 Prior to 1983, the respondents were Animal Control Officers employed by the Ottawa Police Force. They were members of a union, the Ottawa Police Association, and their terms of employment were governed by a collective agreement. In that year, 1983, discussions took place between the Police Force and the City of Ottawa about transferring the Animal Control Division, and thus the respondents, from the Ottawa Police to the Physical Environment Department of the City of Ottawa. The underlying concern appeared to be that animal control should be dealt with by municipal employees rather than members of the Police Force.

7 The transfer of the employees to the City of Ottawa was approved in principle by Ottawa City Council on September 7, 1983, but did not in fact occur until more than a year and a half later, on May 1, 1985.

8 The respondents allege that in September 1983, while they were still employees of the Police Force, they had a meeting with representatives of the City of Ottawa, the Police Force and union officials representing both the Ottawa Police Association (the employees' then union) and CUPE (their future union). The respondents allege that in the course of this meeting the City of Ottawa agreed that, to secure the respondents' agreement to the proposed transfer, the respondents would continue to enjoy the same terms and conditions as employees of the City of Ottawa as they had previously enjoyed as civilian employees of the Police Force. Paragraph 11 of the statement of claim reads as follows:

> In the course of the [September 1983] meeting, the Defendant [City of Ottawa], in an attempt to induce the Plaintiffs to agree to the transfer, expressly assured and represented to the Plaintiffs that the level of the terms and conditions that each of the Plaintiffs enjoyed with the Ottawa Police Force shall be retained, and that the Plaintiffs shall not be in a "worse position" as a result of their transfer to the Department of the Physical Environment. The Plaintiffs relied, and the Defendant was aware of the Plaintiffs' reliance, on the agreement. . . .

9 The City agrees that such a meeting took place but denies that any such agreement was made. Further, the appellant says that, on at least three occasions after September 1983 but before the transfer, the respondents were told that, once their transfer was finalized, their terms and conditions of employment would be the same as other municipal employees, similarly classified, under the collective agreement between the City of Ottawa and CUPE. Issue was thus joined.

10 I note parenthetically that the appellant has not taken the position that any pre-employment agreement somehow became unenforceable as a matter of law once the employees entered the CUPE

bargaining unit on May 1, 1985. Its position, purely and simply, is that no such pre-employment contract was made.

The Essential Character of the Claim

11 On May 5, 1985, four days after the respondents' transfer to the CUPE bargaining unit, they were told by the appellant that the Animal Control Officers would be required to work a 40-hour week just like other municipal employees. This change was effective July 5, 1985. Previously, as employees of the Police Force, they were required to work only 35 hours a week.

12 The respondents plead that they worked the additional five hours a week "under protest". Three years later, on July 18, 1988, they filed a grievance under the CUPE agreement. A settlement was agreed to on November 18, 1988, but the settlement did not deal with the period prior to the date of settlement.

13 Apart from the lengthened work week, the respondents claim loss of benefits including accumulated sick days, their benefits under the "Age 60 Retirement Pension Plan" in effect with the Police Force, and that their salaries were "red-circled", effectively freezing their income.

14 The respondents also claim compensation for lost benefits, together with "damage to the plaintiffs' professional status and reputation", and damages for "substantial stress and anxiety" as a result of their treatment by the City.

15 All of these claims are rooted in the alleged pre-employment contract.

The Proceedings

16 On April 6, 1990, the respondents commenced the present action claiming damages in excess of a million dollars. The statement of claim supplemented their contractual claims with related allegations of fraudulent or negligent misrepresentation, and unjust enrichment.

17 The appellant City denied the existence of any pre-employment contract, affirmed that from and after May 1, 1985, the respondents were covered by the CUPE collective agreement, and indeed counter-claimed for what the appellant alleged was an over-payment of wages to some of the respondents in 1987 and 1988.

18 After the exchange of pleadings, not much was done by the respondents until they were jolted into action on July 29, 1998, by an order of the Ontario Court (General Division) dismissing their action as abandoned. The respondents say this order was the result of a misunderstanding. In any event, the respondents having survived this mishap, the City then moved to have the action dismissed on the basis that the court had no jurisdiction over a "labour relations" subject matter. As stated, the motions judge gave effect to this objection and dismissed the action.

19 The Court of Appeal for Ontario reversed that dismissal on the basis that "it would be open to a trial judge to find that the plaintiffs had a pre-employment agreement with the respondent. If so, their claims do not arise out of the collective agreement with the Police Association" ((2001), 197 D.L.R. (4th) 543, at para. 9). However, the court added, it would be open to the City to argue at trial, in light of the evidence, that "the court has no jurisdiction once the true nature of the alleged [pre-employment] agreement is established" (para. 9).

Relevant Legislative Provisions

20 *Labour Relations Act*, R.S.O. 1990, c. L.2

> **45.** — (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

RULE 20 SUMMARY JUDGMENT

WHERE AVAILABLE

To Plaintiff

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just.

To Defendant

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1)(a), except with leave of a judge or on consent of the parties;

(b) under clause (1)(b).

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

(a) the court has no jurisdiction over the subject matter of the action;

Capacity

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

Another Proceeding Pending

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

MOTION TO BE MADE PROMPTLY

21.02 A motion under rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs.

Analysis

21 This appeal raises two issues: firstly, the jurisdiction of the court to deal with the cause of action asserted by the respondents; and secondly, whether the jurisdictional issue could properly be dealt with in the circumstances of this case by way of a preliminary motion. Both issues can be resolved briefly.

A. *Is the Cause of Action Asserted by the Respondents Within the Jurisdiction of the Courts or a Labour Arbitrator?*

22 The principle that disputes arising under a collective agreement should be resolved by labour arbitrators, not courts, is based on legislative intent. In *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, Estey J. laid down the general principle at pp. 718-19:

> The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks.

23 Subsequent cases have confirmed that if the dispute between the parties in its "essential character" arises from the interpretation, application, administration or violation of the collective agreement, it is to be determined by an arbitrator appointed in accordance with the collective agreement, and not by the courts. See *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at paras. 41 and 52, and *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14, at paras. 23 and 25.

24 None of these cases purported to deny access to the courts by plaintiffs who allege a cause of action outside the collective agreement. The appellant complains that the decision in the courts below undermines "the sanctity of agreed arbitration clauses in collective agreements" and permits unionized employees to "get out of collective agreements and litigate labour relations issues, instead of going through regular grievance arbitration process", and says the issue here is "whether the approximately 4 million unionized workers in Canada should each, individually, be given the opportunity to forum shop" (appellant's factum, at para. 1). In my view, with respect, this case raises no such issues. In *Wainwright v. Vancouver Shipyards Co.* (1987), 38 D.L.R. (4th) 760 (B.C.C.A.), it was held that the courts have jurisdiction over contracts predating the collective agreement. See also *Johnston v. Dresser Industries Canada Ltd.* (1990), 75 O.R. (2d) 609 (C.A.). Both of these cases were cited with approval by this Court in *Weber*, *supra*, at para. 52. Such disputes are foreign to the collective agreement and are not embraced by the legislative intent favouring arbitration.

25 If, as alleged, the appellant's officials agreed to a pre-employment agreement with the respondents in September 1983, it seems apparent that a dispute over such an agreement, in its essential character, could not arise from the collective agreement between CUPE and the City. For one thing, the respondents were not employees of the City in September 1983. For another thing, the respondents were not at that time in the bargaining unit or members of CUPE, Local 503. They were employed by the Ottawa Police Force, which is an entity separate and distinct from the Corporation of the City of Ottawa. (Under s. 8(5) of the *Police Act*, R.S.O. 1980, c. 381, the Board of Commissioners of Police "may contract and may sue and be sued in its own name".) In September 1983, and until May 1985, the respondents were covered by a collective agreement between the Board of Commissioners of Police and

the Ottawa Police Association. It follows that I cannot agree with the proposition at para. 101 of the appellant's factum that:

> The danger of the Court of Appeal decision below is that it opens the flood gates not only to a tidal wave of grievance and labour disputes in the courts but to the potential dismantling of the entire collective bargaining process and grievance arbitration system in Canada.

26 If a pre-employment agreement was made in September 1983, as alleged, a claim for its enforcement cannot be said to arise from the interpretation, application, administration or violation of the CUPE collective agreement.

B. *The Appropriateness of the Preliminary Motion*

27 The appellant complains that it is being put to the trouble and expense of a law suit merely on the bare allegation of a pre-employment contract. This is true, but of course the courts are open to any litigant who "merely" alleges a cause of action. Procedures exist under the rules of practice to obtain particulars or to bring frivolous or unsupportable claims to an early resolution. The losing litigant may, depending on the view taken of the matter by the motions judge, find itself burdened with costs.

28 In an effort to hasten the end of this lawsuit, counsel for the appellant (who was not counsel on this appeal) belatedly moved on April 25, 1999, about 10 years after the action was begun, to have the respondents' statement of claim struck out for want of jurisdiction under clause 21.01(3)(a) on the basis that "the court has no jurisdiction over the subject matter of the action". I note, in passing, that rule 21.02 requires that such a motion "shall be made promptly".

29 Clause 21.01(3)(a), and its equivalent permitting a jurisdictional challenge in other provinces, has been widely utilized in labour relations disputes. See, e.g., *Jadwani v. Canada (Attorney General)* (2001), 52 O.R. (3d) 660 (C.A.); *Giorno v. Pappas* (1999), 170 D.L.R. (4th) 160 (Ont. C.A.), at para. 16; *Bhaduria v. Toronto Board of Education* (1999), 173 D.L.R. (4th) 382 (Ont. C.A.), at para. 2; and *Bhairo v. Westfair Foods Ltd.*, [1997] M.J. No. 219 (QL) (C.A.). Although Alberta and Newfoundland lack a special rule on jurisdictional challenges, the courts in those provinces achieve the same result on a motion to strike: *Allen v. Alberta* (2001), 286 A.R. 132 (C.A.); *Young Estate v. TransAlta Utilities Corp.* (1997), 209 A.R. 89 (C.A.); and *Roberts v. Browning Ferris Industries Ltd.* (1998), 170 Nfld. & P.E.I.R. 228 (Nfld. C.A.).

30 In the present case, the principal difficulty confronting the appellant was not legal but factual. To meet the allegation of a pre-employment contract, the appellant felt it necessary to file the affidavit of Rosemarie Leclair, Commissioner of Corporate Services of the City of Ottawa. The affidavit, according to the appellant, showed that there was no such pre-employment contract. Yet it confirmed, at the same time, the existence of a serious factual dispute. That being the case, I do not think that the appellant could avoid the exigencies of a summary judgment motion (rule 20) by framing its attack as a jurisdictional challenge under clause 21.01(3)(a). As Borins J.A. pointed out in *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), a pleadings motion generally "offers no assistance in weeding out cases where a substantively adequate claim, or defence, has been pleaded, but cannot be proved" (para. 14).

31 The appellant's dilemma is illustrated by the great "snail in the bottle" case of *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), which, as every law student knows, laid the basis for the modern law of negligence. After the House of Lords had decided that a soft drinks manufacturer could indeed be tortiously liable for shock "and severe gastro-enteritis" suffered by a consumer who allegedly found a decomposed snail in her bottle of ginger beer, and therefore allowed the case to proceed to trial, it was held by the trial court that in fact there was no snail in the bottle after all. (See reference by Jenkins L.J. in *Adler v. Dickson*, [1954] 1 W.L.R. 1482 (C.A.), at p. 1483.) In *Donoghue*, *supra*, the defendant brought a preliminary motion to test a proposition of law, the answer to which, in the words of Ontario clause 21.01(1)(a), "may dispose of all or part of the action". The equivalent to what was tried here would have occurred if the soft drinks manufacturer, instead of arguing the legal point, had attempted to use the preliminary motion to establish that there was no snail in the bottle. Such a genuine issue of fact there, as here, had to be sent to trial.

32 It is the practice in Ontario for the motions court to receive evidence pertinent to the jurisdictional issue, such as a copy of the collective agreement (see the cases cited in para. 29), or other affidavit evidence (*Leufkens v. Alba Tours International Inc.* (2001), 53 O.R. (3d) 112 (S.C.J.), and, on the issue of capacity, *S. (J.R.) v. Glendinning* (2000), 191 D.L.R. (4th) 750 (S.C.J. Ont.)), but it was not appropriate for the appellant to attempt to turn a jurisdictional challenge under clause 21.01(3)(a) into a mini-trial on a disputed, central question of fact. If the appellant was of the view that the pleading of a pre-employment contract was a sham and raised no genuine issue for trial, it ought to have moved for summary judgment pursuant to rule 20.01. In that case, while the onus would have been on the appellant as the moving party to establish the absence of a genuine issue for trial, each side would have been required to "put its best foot forward" (*Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434, *per* Sharpe J., as he then was), with respect to the existence or non-existence of the pre-employment contract, or, as Osborne J.A. put it in *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.), at p. 557, "a respondent on a motion for summary judgment must lead trump or risk losing". See also *Aguonie v. Galion Solid Waste Material Inc.* (1998), 156 D.L.R. (4th) 222 (Ont. C.A.), and *Dawson*, *supra*. Generally, if there is an issue of credibility which is material, summary judgment will be refused: *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.).

33 The respondents were under no evidentiary obligation at this stage to prove the existence of a pre-employment contract for the purposes of surviving a jurisdictional challenge under clause 21.01 (3)(a). The pleadings themselves established that the central allegation of jurisdictional fact (the existence of a pre-employment contract) was also the central issue on liability in the law suit. This is not a jurisdictional issue that turns on uncontroverted or easily ascertainable facts. Clearly, credibility would very much be an issue.

34 I agree with the Ontario Court of Appeal that the appellant's approach was misconceived. The disagreement between the parties was essentially factual, not legal. In light of the factual issues raised by the pleadings, the jurisdictional issue could not be determined on a preliminary motion. The motions judge should not therefore have driven the respondents so precipitously "from the judgment seat", *per* Wilson J. in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 973.

Disposition

35 I would dismiss the appeal with costs to the respondents.

Appeal dismissed with costs.

Solicitors for the appellant: Lang Michener, Ottawa; Corporation of the City of Ottawa, Ottawa.

Solicitors for the respondents: Binavince Smith, Ottawa.